

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN E. FELGAR,	:	
Plaintiff	:	
	:	
v.	:	No. 05-126E
	:	
PENNSYLVANIA BOARD OF	:	
PROBATION AND PAROLE, ET AL.,	:	
Defendants	:	

Hearing in the above-captioned matter held
on Friday, September 23rd, 2005, commencing at
10:00 a.m., before the Honorable Susan Paradise Baxter,
at the United States Courthouse, Courtroom B, 617 State
Street, Erie, Pennsylvania 16501.

For the Plaintiff:

Kemal Alexander Mericli, Esquire (Via telephone)
Office of the Attorney General
564 Forbes Avenue
Pittsburgh, PA 15219

For the Defendant: (Via Telephone)

John E. Felgar (Pro se)

Reported by Janis L. Ferguson, RPR

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I N D E X

TRANSCRIPT OF PROCEEDINGS 3

1 THE COURT: Good morning.

2 MR. MERICLI: Good morning, Your Honor.

3 THE COURT: I apologize. I did a return phone
4 call at five of 10:00, thinking it would take two minutes,
5 and, of course, it took longer, and I apologize for being
6 late.

7 MR. MERICLI: That's no problem, Your Honor.

8 THE COURT: Let me call the case. It's John E.
9 Felgar versus Pennsylvania Board of Probation and Parole, et
10 al., Civil Action No. 04196-Erie.

11 In my chambers I have my staff attorney,
12 Frank Fogl, Esquire, and the court reporter.

13 Kem, will you identify everyone on line.

14 MR. MERICLI: Okay. Kemal Alexander Mericli for
15 the Office of the Attorney General and the defense in this
16 case.

17 Mr. Felgar, will you please identify
18 yourself.

19 MR. FELGAR: Yes. At this time I'd like to ask
20 for a continuance.

21 THE COURT: Yes, I received your motion for a
22 continuance. However, we have -- issues are coming up,
23 because October 10th is your date. So I denied the motion
24 for a continuance, because I don't think you need an
25 attorney for this and because I wanted to get this issue

1 taken care of today. And I had continued today's hearing --
2 last week's hearing to today to try to get to the bottom of
3 the issues and also get to the bottom of your motion for a
4 preliminary injunction. Which, by its terms, Mr. Felgar
5 asked for immediate relief. So I'm going to deny the motion
6 for a continuance.

7 Let's figure out here -- well, I'll let
8 Mr. Mericli at least speak now to tell us what he's
9 discovered that I asked him to look into over the course of
10 this past week.

11 MR. MERICLI: Okay. I understand that Mr. Felgar
12 has a letter that I sent to you and that I just faxed a copy
13 to Kaylene Carlson. And it's my study of the records in the
14 case, which according to the Department of Corrections, he
15 has an expiration date of October 10th, 2005.

16 And the confusion arises in part because the
17 court system had switched back and forth over the label of
18 the crime the six- to 24-month sentence is on; whether it's
19 terroristic threats or whether it's simple assault, both of
20 which he pleaded guilty to, and a recklessly endangering
21 charge was nolle prosqued at that time.

22 And I have gone through to show that he was
23 sentenced following that guilty plea on October -- on
24 August 22nd, 2002. And that I think what may have disturbed
25 Mr. Felgar is the fact that before that occurred, from

1 October 2nd, 2001 till August 17th, 2001, he was in a CCC
2 center, and when the time went to revoke his parole and give
3 him back time, that CCC time was not treated as -- as
4 confinement time; it was treated as street time and erased.
5 And that that was reviewed by the Commonwealth Court, and
6 they upheld that, using an analysis taken from a case called
7 Rivenbark and said that the renewal CCC center wasn't enough
8 of a jail for him to get credit for time served on that
9 time.

10 And the even more confusing question is he
11 had a girlfriend at the time. Her name was Diana Hoobler.
12 And she came forward only on October 2nd, 2001 to say that
13 an incident had occurred on August 15th, 2001, and that
14 incident was the basis for his guilty plea to the
15 terroristic threats and simple assault on August 22nd, 2002.

16 And you may be confused, because, in effect,
17 his prior aggravated assault and second-time DUI sentence
18 had already fully maxed out by the time they brought this
19 charge, based on what Diana Hoobler had said. And they went
20 back and violated his parole on that two- to four-year
21 sentence, even though that sentence had expired, common
22 sensically, by the time they went back to do this. And the
23 rationale for that is stated in a case that I put in my
24 letter, and it's also in Mr. Engelberg's answer to the
25 habeas, Young versus the Pennsylvania Board of Probation and

1 Parole.

2 The fact is when he committed the crimes
3 against Diana Hoobler on August 15, 2001, that sentence on
4 the aggravated assault, DUI of two to four years had not yet
5 expired. So the fact that the crime -- and an arrest
6 warrant was also filed on October 24th, 2001. So the fact
7 that both the crime and the arrest occurred before you maxed
8 out on the two- to four-year sentence allows them to go back
9 and give him a back-time hit on the two- to four-year
10 sentence and take away some of the street time and make him
11 serve that time before he gets to serve the six to 24
12 months.

13 THE COURT: Now, is Young a Supreme Court case of
14 the state?

15 MR. MERICLI: No. It's a Commonwealth case --
16 yes, it is. It's a Supreme Court case. I'm sorry. It's a
17 Supreme Court case. His case about whether he got credit
18 for the time served in the CCC center is a Commonwealth
19 Court case.

20 THE COURT: Okay. Mr. Felgar --

21 MR. FELGAR: Yes.

22 THE COURT: -- it is true that there is a Supreme
23 Court of Pennsylvania case that says that the Parole Board
24 can go back, make you do back time for an expired sentence
25 if you are convicted later of having committed a crime

1 during your parole before that sentence expired.

2 MR. FELGAR: Right.

3 THE COURT: And that is what they are arguing they
4 did.

5 MR. FELGAR: Right, Your Honor. But what has
6 happened here is I was violated, and I was not given notice
7 of -- I have asked for a full board hearing, revocation
8 hearing, and I was not given notice of the hearing or
9 anything, and I maxed out. And right there, that -- my
10 parole was done.

11 THE COURT: Yes, but they didn't give you a notice
12 of it because they didn't charge you until after it was
13 maxed out.

14 MR. FELGAR: I was charged before.

15 THE COURT: Not according to this.

16 MR. FELGAR: On October 1st, 2001. I was charged
17 with violating parole from assaultive behavior.

18 MR. MERICLI: Yeah, there was the Parole Board --

19 MR. FELGAR: To the current charge; simple
20 assault, terroristic threats. And then I got violated again
21 a year later. That's double jeopardy. I don't care how --
22 which way anybody --

23 THE COURT: When did you get violated a year
24 later?

25 MR. FELGAR: On November 11th, 2002, I had a

1 revocation hearing on the same charges.

2 MR. MERICLI: Well, no.

3 THE COURT: No. No, no, no. You didn't get
4 another violation then. It says in Mr. Mericli's letter, it
5 says you would have maxed out on November 11th. Right?

6 MR. MERICLI: Right. And he got his -- he -- what
7 happened is he -- he -- Diana Hoobler did not want him to
8 come from the renewal CCC center and live in her home, which
9 was his plan. Which was the plan that everyone was working
10 with.

11 MR. FELGAR: Excuse me. That was my home, sir.

12 MR. MERICLI: Oh. Well, your home. Anyway, she
13 didn't -- she at that point revealed this incident which he
14 subsequently pleaded guilty to, which was supposed to have
15 taken place on August 15th, 2001. But she waited -- and
16 according to the Parole Board records, she said the reason
17 is she didn't want them to be living together in a home
18 jointly. And that's why she waited until October 2nd, 2001,
19 when he was due to be finished with his renewal CCC program.

20 MR. FELGAR: Sir, the sole reason she didn't want
21 me to come home is because she was seeing the next-door
22 neighbor. She ended up marrying --

23 THE COURT: Well, it doesn't matter what the
24 reason. It doesn't matter.

25 MR. MERICLI: It doesn't matter. You know, this

1 is why that came to a head then.

2 MR. FELGAR: This is all irrelevant.

3 THE COURT: Yes, but what is relevant is on
4 August 22nd, 2002, you weren't given a double jeopardy hit.
5 The first time, from my understanding, it was a revocation
6 violation. In 2002, it was charges arising out of assault.
7 Those are two different things.

8 MR. MERICLI: Well, no.

9 THE COURT: Right?

10 MR. MERICLI: Yes. He was -- he was -- the
11 arrest -- he was arrested on a Parole Board warrant on
12 October 2nd, 2001, based on the charges Diana Hoobler made
13 that he had assaulted her. Then subsequently, on
14 October 24th, 2001, the local police filed a criminal arrest
15 warrant. So there were two warrants out then. There was a
16 detainer and there was the police arrest warrant.

17 On November 11th, 2001, he maxed out on his
18 two- to four-year sentence without considering whether or
19 not he would get a hit. At that point he was switched over
20 to custody on the arrest warrant that was filed by the local
21 police on October 24th, 2001. He then made bail at \$500.
22 He stayed out on that bail until July 8th, 2002. For some
23 reason, which I don't know, on that date, his bail was
24 revoked.

25 Then he went to a guilty plea, represented by

1 counsel, on August 22nd, 2002, and he pleaded guilty to
2 terroristic threats and simple assault, and the reckless
3 endangerment charge was nolle prosqued. Then he got a six-
4 to 24-month sentence. At that point he started to serve the
5 six- to 24-month sentence.

6 Then -- and I do understand why it seems
7 astonishing. Then out of nowhere, it must have seemed like
8 to him, the Parole Board on December 11th, 2002, tells him,
9 wait a minute, you're going to get a back-time hit on your
10 parole. He said, wait, I maxed out on that sentence
11 November 11th, 2001. They said, doesn't matter; you had --
12 you had a Parole Board revocation warrant in there on
13 October 2nd, 2001, and you subsequently had an arrest
14 warrant from the local police on October 24th, 2001, and
15 that gives us jurisdiction to go back and take a look at
16 your two- to four-year sentence and see if we want you to do
17 some back time on that.

18 They then gave him a 12-month hit on the back
19 time, which started to run on December 10th, the date they
20 had that hearing, and he served out that 12-month hit until
21 April the 10th of 2004, and then he went on to this six to
22 24 months, having already served six months, two days before
23 all this stuff caught up with him.

24 THE COURT: I now get it. I finally get it. I
25 reread your letter and thought I got it, but I didn't. Now

1 I get it. I get it.

2 MR. MERICLI: So this man is amazed, you know, and
3 to give him -- to give him his dignity, it is amazing.

4 THE COURT: It is amazing, but I see how it works.
5 Now, I do want to say one thing, before we go on.

6 Mr. Felgar, you did not ask to get out early. What you
7 asked for in your preliminary injunction motion is that you
8 would not be placed on probation. In other words, since you
9 were in jail, you think that -- you do not want to enforce a
10 concurrent probationary term.

11 And, secondly, you ask for any -- for us to
12 stop any further collection of fines, restitution, or any
13 other money.

14 MR. FELGAR: I have been asking to be released
15 immediately, ever since this -- this matter began. The
16 habeas corpus.

17 THE COURT: I know, but that's not what you ask --
18 I'm here on the preliminary injunction motion, not on the
19 habeas corpus. I'm here on your preliminary injunction
20 motion.

21 MR. FELGAR: Okay.

22 THE COURT: And what you ask for there is for us
23 to stop them from enforcing a concurrent probationary term
24 and to stop them from any further collection of fines, et
25 cetera.

1 Now --

2 MR. FELGAR: Until disposition.

3 THE COURT: -- do we know what, if any,
4 probationary term will be accompanying his release?

5 MR. MERICLI: He has a five-year concurrent
6 probation. Which every day he served on the six- to
7 24-month sentence ought to be excused from that -- ought to
8 be served against that probation.

9 MR. FELGAR: That is erroneous, Your Honor.

10 MR. MERICLI: So that means all he has is the five
11 years left --

12 MR. FELGAR: Your Honor, can I respond to --

13 THE COURT: Yes, you sure can. Let him finish.
14 Wait a minute. Let him finish, and then you can respond.

15 MR. MERICLI: Okay. You know, it's a
16 concurrent -- at one point he said that they were treating
17 it as if it was a consecutive five-year probation. Which
18 assuming he gets out on October 10th -- and I still think it
19 should be October 8th, and I brought that to his counselor's
20 attention. But anyway, when he gets out, whenever he gets
21 out, either the 8th or the 10th, he's got to serve the
22 probation. They had it down at one point as consecutive
23 five years, which means it would run five years from
24 October 10th. I don't think it should run five years from
25 October 10th. I think it was imposed as a concurrent

1 probation.

2 So that means during the time he was in jail,
3 the probation also ran, in my humble opinion. So that means
4 however many -- you know, six months and two days plus
5 whatever it is when he started serving this sentence on
6 April 10th, 2004, plus all that time should be subtracted
7 from the five-year probation, and that's how much probation
8 he has left to do.

9 THE COURT: All right. And what is your argument,
10 Mr. Felgar?

11 MR. FELGAR: Okay, Your Honor. The written
12 sentence order, by Court Order on August 26th, 2002, is
13 unambiguous. What is ambiguous is the negligence behind the
14 actions of officials illegally committing me to the State
15 Correctional Institution --

16 THE COURT: Can you speak closer. We're losing
17 you. Speak into the telephone closer.

18 MR. FELGAR: Oh, okay.

19 THE COURT: Go ahead. Keep going.

20 MR. FELGAR: Let me start over again.

21 THE COURT: Yes.

22 MR. FELGAR: Okay, Your Honor. The correction of
23 the written sentence by Court Order on August 26th, 2002, I
24 think is clear and unambiguous.

25 THE COURT: All right, I'm looking at it.

1 MR. FELGAR: What is ambiguous is the negligence
2 behind the actions of officials illegally committing me to
3 the State Correctional Institution. And was the detainer
4 that the Probation Board lodged against me legal when I was
5 already currently being held unlawfully.

6 Your Honor, in regard to the letter of
7 September 19th, 2005, which was sent to you by Senior Deputy
8 Attorney General Mericli --

9 THE COURT: That's who is on the phone with us,
10 Mr. Mericli.

11 MR. FELGAR: The respondent. I filed a motion to
12 object on September 19th, 2005 to this correspondence.

13 THE COURT: Okay.

14 MR. FELGAR: Nevertheless, he states in his letter
15 that this case is a, quote, very confusing case, unquote.
16 Which is true, Your Honor, considering the case history of
17 this matter.

18 Clearly, Your Honor, the respondents are
19 trying to make a boilerplate and red herring issue here,
20 when in all actuality, the amended sentence order clearly
21 and unambiguously states that the written sentence order of
22 August 22nd, 2002, is directed to reduce the charge of
23 terroristic threats M-1, not simple assault.

24 Your Honor, in a legal sense, the order was
25 drafted and signed by the Judge of Jefferson County on

1 August 23rd, 2002. The Judge corrected this order on
2 August 26th, 2002, in effect, suspending the sentence of six
3 months to two years -- six months' to 24 months'
4 incarceration, and placing me --

5 MR. MERICLI: That's where you're wrong, sir.

6 MR. FELGAR: And placing me on probation with
7 simple assault [sic], to run concurrent with the sentence at
8 the same docket number. It says it clearly, Your Honor. As
9 far as the plea agreement goes, Your Honor, by legal
10 standards, it should be moot, and the issue of a breach of
11 contract is also in question.

12 THE COURT: Now, let me --

13 MR. FELGAR: Your Honor --

14 THE COURT: Hold on. I'm speaking. When I speak,
15 I get to cut in. I have that privilege. All right. Here
16 we go.

17 In the Sentence Status Summary filed -- this
18 is the last version. It says that the offense should be
19 simple assault, yet it says, at a six-month to two-year
20 term. So all they say is changed is the words "terroristic
21 threats" to "simple assault", but with no change of six
22 months to two years.

23 MR. MERICLI: And that's what -- if I may
24 interject, that's how I understand it too.

25 THE COURT: Well, that's what I'm reading. What

1 is your argument to that?

2 MR. FELGAR: Which sentence status sheet is this?

3 THE COURT: This is a Sentence Status Summary. It
4 is dated -- where is the date on this? 7/22/04. It says
5 "closed Version 6".

6 MR. FELGAR: Okay. Well, they made a new one,
7 Your Honor.

8 THE COURT: Well, I don't have it, so I can't rule
9 on it. Where is the new one?

10 MR. FELGAR: I have got it right here. And the
11 new one states --

12 THE COURT: Okay. Down in the remarks, why don't
13 you read what it says.

14 MR. FELGAR: Okay. The new one states, "Version 7
15 is being created to reflect five-year concurrent probation,
16 terroristic threats, 8/22/02. Note: This offense has been
17 shown under 4." Do you see 4 on the copy you have?

18 THE COURT: Say that again.

19 MR. FELGAR: "This offense has been shown under 4,
20 nonincarcerated offenses."

21 THE COURT: Under 4?

22 MR. FELGAR: Yeah. Version 4 of the Sentence
23 Status Sheet. It's in that big square there on the --

24 THE COURT: Right, right.

25 MR. FELGAR: And that says, "Version 4 is being

1 created per Court Order dated 8/26/02. Sentence order of
2 8/22 incorrectly lists the charge of simple assault, when it
3 should be charged as terroristic threats."

4 THE COURT: Yes, that's fine.

5 MR. FELGAR: Okay. Now, the rest of this note
6 down here, it says under 4, "Offenses on Versions 3, 4, 5,
7 and 6, however, is not visibly shown when bringing up --"

8 THE COURT: The court reporter can't understand
9 you. You have to speak more clearly.

10 MR. FELGAR: Okay.

11 THE COURT: Wait a second. Do you have a copy of
12 this, Mr. Mericli?

13 MR. MERICLI: No.

14 THE COURT: When is the date on this one that
15 you're reading? It's up in the top right-hand corner.

16 MR. FELGAR: Yes. This is 8/31/2005.

17 THE COURT: Why haven't you sent that to me?

18 MR. FELGAR: This is in the grievance that I filed
19 here with the DOC.

20 THE COURT: Yes, but you didn't send it to the
21 Court, so I can't use it to rule.

22 MR. FELGAR: I just received it.

23 THE COURT: No, you said you received it in
24 August. You sent me a ton of stuff. You didn't send me
25 that.

1 MR. FELGAR: Well, when I filed the Motion for
2 Preliminary Injunction --

3 THE COURT: It's not there.

4 MR. FELGAR: And this -- this Sentence Status
5 Sheet is still under grievance here; a grievance procedure.

6 THE COURT: Yes, but you have a copy of it. You
7 should have made a copy of it and sent it to me. I can't
8 use it for evidence if I don't have it.

9 MR. FELGAR: That's the problem with this hearing
10 over the phone, Your Honor. I can't present any other
11 evidence --

12 THE COURT: Yes, but you're sending me all sorts
13 of filings. Attach it to something. Make a copy.

14 MR. MERICLI: If I may interject.

15 THE COURT: Go ahead.

16 MR. MERICLI: If it's possible. I --

17 MR. FELGAR: I'm not a lawyer.

18 THE COURT: I know. I know.

19 MR. MERICLI: Well, the thing is, it seems to me
20 that, you know --

21 MR. FELGAR: I'm not finished here, Your Honor,
22 with what I'm --

23 THE COURT: I know. But I want to hear what he
24 has to say. Go ahead.

25 MR. MERICLI: Okay. It just seems to me that this

1 man is disturbed because he --

2 MR. FELGAR: Disturbed?

3 MR. MERICLI: Disturbed. I mean upset. I mean --

4 MR. FELGAR: I'm being incarcerated illegally for
5 three and a half years.

6 THE COURT: Well, it doesn't appear so, so just
7 hold on a second.

8 MR. MERICLI: Just wait a second. He's unhappy,
9 disturbed, whatever you want to say, of his position,
10 because he believes that he pleaded guilty on August 22nd,
11 2002 to something, and the problem is that the name of that
12 something has been changed more than once. And it's also a
13 situation where on -- at one point, when he was originally
14 sentenced -- he was sentenced, whatever he was sentenced
15 for, to six months to 24 months and five-years' concurrent
16 probation. Now, that's --

17 MR. FELGAR: That was suspended, and I was placed
18 on five-years' probation. It says right on the Order, sir.
19 I am reading the Order.

20 MR. MERICLI: I understand the Order. But you're
21 saying -- you're saying that the six- to 24-month sentence
22 was a suspended sentence.

23 MR. FELGAR: Right.

24 MR. MERICLI: And that he should have been put on
25 probation right at that time.

1 MR. FELGAR: I was placed on probation.

2 MR. MERICLI: Why did they put you in prison,
3 then, right the next day?

4 THE COURT: Where is that Order?

5 MR. FELGAR: I was delivered to --

6 THE COURT: Mr. Felgar, where is that Order that
7 says that?

8 MR. MERICLI: I understand your point. You're
9 saying that the six- to 24-month --

10 THE COURT: Was suspended.

11 MR. MERICLI: -- was a suspended sentence and that
12 you shouldn't have been thrown over to the six- to 24-month
13 sentence on November 11th, 2001, when you maxed out --

14 THE COURT: Mr. Felgar, you can't speak while
15 someone else is speaking.

16 MR. MERICLI: Okay. Well, just let me finish now.
17 What you're saying is -- what he's saying is, Your Honor --
18 what he's saying -- and I'm not endorsing it or attacking
19 it.

20 THE COURT: I do understand. He's saying that it
21 was suspended --

22 MR. MERICLI: The six- to 24-month was a
23 surplusage statement. That he was sentenced to six to 24
24 months, and then it was immediately suspended, and he was
25 put on five-years' concurrent probation. But since he was

1 serving -- he was -- his parole had been revoked on his
2 two-to-four at that time. So he wouldn't have walked out of
3 the courtroom if it was a suspended sentence. But what
4 happened was he maxed out on the --

5 MR. FELGAR: No. It was amended four days later.
6 I was given an illegal sentence on August 22nd. I just sent
7 that.

8 THE COURT: Why was it illegal?

9 MR. FELGAR: They had simple assault. Five years
10 probation, simple assault. A Misdemeanor 2 only carries two
11 years, Your Honor, not five years.

12 MR. MERICLI: That's the first time I heard this.

13 THE COURT: Well, did you --

14 MR. FELGAR: They switched it to terroristic
15 threats.

16 THE COURT: Did you appeal that?

17 MR. FELGAR: Pardon me?

18 THE COURT: Did you appeal that?

19 MR. FELGAR: What do you mean, did I -- yeah, I
20 went to a post-conviction hearing.

21 THE COURT: But you didn't appeal it directly.

22 MR. FELGAR: I didn't know about it. I was not
23 informed of this.

24 THE COURT: Okay. When you appealed it --

25 MR. FELGAR: But after the revocation hearing, six

1 months later I found out about this. I stated that in my
2 petition -- my Answer petition.

3 THE COURT: All right. And what happened at the
4 PCRA level?

5 MR. FELGAR: My -- my public defender avoided his
6 public office position, Your Honor --

7 MR. MERICLI: Did you plead guilty on
8 August 22nd --

9 THE COURT: Wait a minute, Kem.

10 MR. FELGAR: He sided with the Commonwealth to
11 cover up this illegal commitment. The respondent should not
12 even be responding here.

13 MR. MERICLI: I understand.

14 MR. FELGAR: They already committed fraud in the
15 original filings here, and they are in default, Your Honor.

16 THE COURT: No. No. All right. Hold on. Hold
17 on.

18 MR. MERICLI: Yeah. Here is my question, Your
19 Honor --

20 MR. FELGAR: This is against the rules; Rule 5.

21 THE COURT: They are not in default. Why are you
22 saying they are in default?

23 MR. MERICLI: Because he doesn't want me to talk.

24 THE COURT: There's no reason to -- under the
25 Rules --

1 MR. FELGAR: They altered my Sentence Status
2 Sheet. The evidence that they put against me to you.

3 THE COURT: They doctored the evidence --

4 MR. FELGAR: To hide the fact that I was doing a
5 five-year probation sentence for terroristic threats.

6 THE COURT: You're charging that they doctored the
7 sheets that they gave me.

8 MR. FELGAR: Right. Them and Unit -- G Unit here
9 at the institution, it come to my attention that the
10 Sentence Status Sheet here was also altered.

11 THE COURT: Do you have any proof of that?

12 MR. FELGAR: Yes. I sent it to you, Your Honor.
13 And I got proof from the grievance that I'm filing.

14 THE COURT: What did you send me?

15 MR. FELGAR: Now they are trying to -- in the
16 grievance, they are trying to say that it was a glitch in
17 the system, in the computer system. And glitches don't --
18 computers, copy machines, and fax machines don't make
19 glitches. This was just a copy of the -- July 22nd, 2004
20 copy of my Sentence Status Sheet.

21 THE COURT: All right. Hold on one second.

22 MR. FELGAR: The time and date is the same
23 exact --

24 MR. MERICLI: Can I interject at some point?

25 MR. FELGAR: -- in my Answer petition, and the

1 respondent's copy was deleted.

2 THE COURT: All right. Okay. That's on the
3 record. Go ahead, Mr. Mericli.

4 MR. MERICLI: I just want to put the following
5 focal point on -- in front of the Court. That is, before
6 his two- to four-year sentence for aggravated assault and
7 second offense DUI had expired, on August -- rather, before
8 that time, on October 24th, 2001, he was arrested on
9 criminal charges arising out of the Complaint of Diana
10 Hoobler. Prior to that time, on October 2nd, 2001, he had a
11 parole revocation warrant arising out of the Complaint of
12 Diana Hoobler.

13 Based on those two warrants, which relate to
14 one single incident on August 22nd, 2002, he pleaded guilty
15 in the Court of Common Pleas of Jefferson County to
16 something, and he got some sort of a sentence. And it seems
17 to me that he can't avoid dealing with that fact.

18 Now, whether that --

19 THE COURT: Well, I do have --

20 MR. FELGAR: He's trying to --

21 THE COURT: Both of you stop. Both of you stop.
22 I want to interject. There is a response to a grievance,
23 Mr. Mericli, that states, "On 7/22/04, the latest version of
24 the 16(e) form reflects the charge of terroristic threats as
25 a nonincarcerated offense."

1 MR. FELGAR: Right, Your Honor.

2 THE COURT: "With a sentence of five-years'
3 probation."

4 MR. FELGAR: Right. Thank you.

5 THE COURT: Now, if there is something in the
6 record that reflects there should be no sentence associated
7 with that plea, other than a five-year probation, has he
8 served time he shouldn't have?

9 MR. MERICLI: Yeah. Yes, Your Honor. He has. If
10 there's no six- to 24-month sentence, then it seems to me he
11 has served time he shouldn't have. He served six months and
12 two days on that sentence before the back time had went into
13 effect. He still would have to serve the back-time hit of
14 December 10th to April 10th.

15 THE COURT: Right. Right.

16 MR. MERICLI: But other than that, the period of
17 six months to two days preceding the December 10th would
18 have been unlawful incarceration, and anytime after
19 April 10th, 2004 would have been unlawful incarceration.

20 Unless that six- to 24-month sentence reads
21 six to 24 months plus five-years' concurrent probation, he
22 shouldn't have served any more time.

23 MR. FELGAR: Read the sentence order, sir.

24 MR. MERICLI: What?

25 THE COURT: Where is the sentence order?

1 MR. FELGAR: They're trying to make something out
2 of something that isn't there.

3 THE COURT: Where did you give me the sentence
4 order? Does anyone have in the record --

5 MR. FELGAR: In my Answer petition to respondent's
6 answer. My memorandum.

7 THE COURT: Okay. All right. Let me look.

8 MR. FELGAR: Your Honor, if I was already being
9 illegally held, was the board's detainer that they lodged
10 against me while I was already being illegally held, was
11 that lawful?

12 THE COURT: Well, I don't know what the sentence
13 order says, and I don't know where this grievance response
14 comes from, because it doesn't have --

15 MR. FELGAR: I can fax it --

16 THE COURT: I have it, but it says, "See Gill,
17 records supervisor."

18 MR. MERICLI: Let me get that. Excuse me for one
19 second.

20 THE COURT: That is Appendix A to his preliminary
21 injunction.

22 MR. MERICLI: Okay.

23 THE COURT: And let me look for this order.

24 MR. FELGAR: I've got all this stuff in my lap
25 here, and I don't have --

1 THE COURT: It's hard for me too. You have to
2 understand, a court reporter cannot take down five
3 conversations at one time. So we all have to give each
4 other turns. And I win. When I want to speak, I win. Got
5 it?

6 MR. FELGAR: Got it.

7 THE COURT: All right. Now, I have an order
8 listed August 26th, 2002. It says, "And now, August 26th,
9 2002, it having come to the attention of the Court that the
10 written sentence order of August 22nd, 2002 --"

11 MR. MERICLI: Okay. Everything --

12 THE COURT: Hold on. Hold on. I'm speaking.
13 Hold on. "-- incorrectly listed the charge as simple
14 assault, when it should have been charged as terroristic
15 threats. It is, therefore, hereby ordered that the written
16 sentence order of August 22nd, 2002 is corrected to list the
17 charge as terroristic threats, (M-1)," end quote. It
18 doesn't say anything about a suspended sentence or anything
19 about the sentence anywhere else.

20 Okay. Then the probation office, on
21 August 22nd, 2002, "Having entered a plea of guilty in this
22 matter, the imposition of sentence is hereby suspended, and
23 the Defendant is placed on probation for a period of five
24 years under the supervision of the Parole Board under the
25 following conditions: Said probation shall run concurrent

1 with the sentence imposed at 632-2001, charge of simple
2 assault." So that's the one that was changed to terroristic
3 threats.

4 MR. MERICLI: Yes, Your Honor.

5 THE COURT: Now, I don't understand that. That
6 makes no sense.

7 MR. MERICLI: It does to me, Your Honor. Here's
8 how I think it reads. First he has a charge on August --

9 MR. FELGAR: I'll object to this, Your Honor.

10 MR. MERICLI: Let me talk.

11 THE COURT: He's making an argument --

12 MR. FELGAR: Responding by respondents is against
13 the rules of Rule 5.

14 THE COURT: Excuse me. No.

15 MR. FELGAR: It is --

16 THE COURT: Mr. Felgar, be quiet.

17 MR. FELGAR: Okay.

18 THE COURT: He's making an argument. He's allowed
19 to make it on behalf of his client, and you can make yours.
20 Now, be quiet.

21 Go ahead, Mr. Mericli.

22 MR. MERICLI: Thank you. On August 22nd, 2002, he
23 was -- the sentence -- the first sentence which is Appendix
24 A(1) and A(2) of his -- to his habeas petition, it shows
25 that simple assault M-2 and a six- to 24-month sentence.

1 Then the next thing says simple assault, M-2, and a
2 five-year probation and so many dollars fine and supervision
3 fee. Then we go to appendix C, which is the Order
4 correcting the sentence of August 22nd, 2002.

5 It seems to me, as he said, terroristic
6 threats is the only charge serious enough to support a
7 five-year probation. So what happens here is -- the way I
8 read the sentence is they corrected the August 22nd sentence
9 on probation. They corrected the label to be terroristic
10 threats. That did not do anything to affect the six- to
11 24-month sentence on the simple assault.

12 THE COURT: Then why does it say on that Order
13 that the imposition of sentence is hereby suspended?

14 MR. MERICLI: I don't know.

15 MR. FELGAR: Right, Your Honor.

16 MR. MERICLI: Except are they referring -- I guess
17 I don't under understand that without talking to the
18 sentencing Judge, because I don't understand if that's
19 referring simply to the sentence on terroristic threats
20 being otherwise suspended and five-years' probation, or
21 whether that's being -- the ambiguity here is whether that
22 term, "is hereby suspended" refers to both the simple
23 assault sentence and the terroristic threat sentence, or
24 whether it refers to only the terroristic threat sentence.
25 Because you have to suspend the sentence in order to put

1 somebody on five-years' probation.

2 So if you pleaded guilty to simple assault
3 and terroristic threats, then in order to give him the
4 five-year probation tail on the simple assault time, they
5 would have to suspend sentence on terroristic threats and
6 then put the probationary sentence on. And that's how I
7 read it. That's how it makes sense to me.

8 Now, what this gentleman wants you to believe
9 is -- is -- wait a minute. What he wants you to believe is
10 that when they said sentence suspended, they suspended the
11 whole shebang and only put him on the five-year probation.
12 That's his position.

13 Now, the only way this can be clarified
14 beyond -- either I'm reading it right or he's reading it
15 right. But the person that can tell Your Honor exactly how
16 it should be read is the sentencing Judge. And that's --
17 there's a writ of habeas corpus under Commonwealth versus
18 Isabel, that whenever there's a confusion like this, you're
19 supposed to file it in the State Court, and the State Court
20 is supposed to tell you what it meant.

21 THE COURT: What are you supposed to file in the
22 State Court?

23 MR. MERICLI: A petition for writ of habeas corpus
24 under Commonwealth versus Isabel, asking them to explain
25 what they meant by the terms of their sentence and to make

1 it more clear.

2 MR. FELGAR: Your Honor, there's another case,
3 Commonwealth versus Quinlan, where powers of the Sentencing
4 Court to correct a sentence is bounded considerations of
5 timeliness on the part of the trial court and on the part of
6 the aggrieved party. Oral statements being made by a Judge
7 in passing sentence, but not incorporated in the Written
8 Sentence Order signed by Sentencing Judge are not part of
9 the judgment of sentence.

10 MR. MERICLI: Okay, I understand and I agree with
11 that.

12 THE COURT: That's correct. That's correct. But
13 I don't understand; did he make any statements while he was
14 talking -- giving you the sentence? You might need those
15 statements.

16 MR. MERICLI: See, what we have here is a
17 situation where he pleaded guilty to simple assault and
18 terroristic threats. And then they cut a sentence, and then
19 they went back and corrected it. And I'm trying to be as
20 neutral as possible.

21 His way, he says when they corrected it, they
22 erased all the incarceration time. I say when they
23 corrected it, they simply corrected the probationary --

24 THE COURT: I'm not so sure that's what he's
25 saying. He's saying that the second -- that the probation

1 order, the second order of August 22nd, 2002 suspended the
2 sentence imposed in the first order.

3 MR. MERICLI: That's right. But they are two
4 separate Orders that were handed down on August 22nd. One
5 related to one count, and one related to other.

6 The problem was --

7 MR. FELGAR: But the sentence --

8 MR. MERICLI: Wait a minute. The problem was they
9 put "simple assault" at the top of each page. One should
10 have said simple assault, and one should have said
11 terroristic threats.

12 THE COURT: Oh. Oh, oh.

13 MR. MERICLI: Do you see what I mean? You go
14 to -- it says 632-2001-CR. Then it says OTN, H284299-1.
15 Then it says, "Charge: Simple assault, M-2."

16 Now, if you look at the next page, it says
17 all the same thing, and it says, "Simple assault, M-2."

18 Now, the one is a probation, five years, and
19 the other one -- so I thought, the way I read this, is that
20 they -- there are two pages. The one is sentence, six to --
21 six to 24 months; the other one is sentence, five years
22 probation. I thought they took that second -- that
23 correction on August 26th was meant for that second page.

24 MR. FELGAR: So the Order does not say that.

25 MR. MERICLI: No, it doesn't. But that's how I

1 read it to make sense.

2 MR. FELGAR: That's not saying a probation order.
3 The written sentence, order incorrectly lists the simple
4 assault. The written sentence and order.

5 MR. MERICLI: Right. I'm not arguing with you.
6 I'm saying --

7 MR. FELGAR: I'm not assuming nothing. I'm just
8 going by what the Order says --

9 MR. MERICLI: I'm not arguing with you either.
10 I'm trying to say that --

11 MR. FELGAR: I'm not --

12 THE COURT: One at a time. I'm not going to
13 have -- wait. Let me repeat that. I'm speaking now, so you
14 can take my words down.

15 The Sentence Correction Order dated
16 August 26th says, "The written sentence Order of August 22nd
17 incorrectly lists the charge as simple assault," so it seems
18 to me --

19 MR. MERICLI: When it should be charged as
20 terroristic threats.

21 THE COURT: Right. So it's on top of that one,
22 not the probation order one. That one.

23 MR. MERICLI: They both say simple assault.

24 MR. FELGAR: You're right.

25 MR. MERICLI: They both say simple assault. See?

1 The probation one says -- look at the top of the
2 probation one --

3 THE COURT: I understand. But the only one he
4 corrected was the sentence order. He didn't correct the
5 probation order.

6 MR. MERICLI: I see. I see.

7 THE COURT: See what I'm saying?

8 MR. MERICLI: Yeah, I see what you're saying now.

9 MR. FELGAR: Same thing as the probation order has
10 simple assault, Your Honor. That's five years. That's
11 illegal.

12 MR. MERICLI: They just messed this all up.

13 THE COURT: They messed this all up. All right.
14 Here's what I'm going to require you to do. I am going to
15 recommend --

16 MR. FELGAR: That's why --

17 THE COURT: Here's what I -- hold on. I'm going
18 to recommend denying the motion for preliminary injunction
19 on this basis: The basis that this is the ultimate decision
20 of the habeas court, and that it will be determined in the
21 proceeding of habeas. And I can't decide it on a motion for
22 preliminary injunction.

23 Then what I need for you to do, I will stay
24 the habeas -- which is a very unusual move -- for you to go
25 back to Jefferson County Court and get a clarification of

1 this sentencing order from this Judge. And then when you
2 get that, to present it to this habeas court.

3 MR. FELGAR: Well, Your Honor, one other thing I
4 would like to bring to your attention here. Is in the
5 Motion to Object, I cited a case, U.S. v. Gerbbie, Third
6 Circuit, 2002. It says, "Petitioner further avers that
7 ambiguities in sentencing orders --"

8 THE COURT: I'm sorry. She didn't get it. Hold
9 on. Start again.

10 MR. FELGAR: It states here, "Petitioner further
11 avers that ambiguities in plea agreements, i.e., sentencing
12 orders, are construed against the drafter."

13 There are several courts, Your Honor, that
14 have ruled against the drafter in ambiguous plea agreements
15 and plea orders.

16 THE COURT: Hold on for one second. I'm taking us
17 off the record. I'm putting you on mute for a second. I'll
18 be right back.

19 (Brief pause in proceedings.)

20 THE COURT: I'm back. Let me ask a question. Are
21 these the only sentencing and probation orders that were
22 issued that day?

23 MR. FELGAR: Right, Your Honor.

24 THE COURT: All right. This is a mess.

25 MR. MERICLI: If I may interject, Your Honor.

1 THE COURT: Go ahead.

2 MR. MERICLI: He has a point.

3 THE COURT: I know he does.

4 MR. MERICLI: I thought that -- but I think what
5 they did -- and they may be hoist on this, but I think what
6 they meant to do --

7 MR. FELGAR: You can't assume. You've got to go
8 by what --

9 THE COURT: Excuse me. Excuse me. He's just
10 trying to help me figure this out. He's agreed with you.
11 He's just saying I think they thought they were doing
12 something, but they didn't.

13 MR. FELGAR: I'm sorry, Your Honor. It's just so
14 frustrating.

15 THE COURT: I know. Well, you're going to have to
16 learn to hold your tongue.

17 MR. FELGAR: Okay.

18 THE COURT: All right. I understand, Mr. Mericli,
19 what you're about to say. You're about to say you think
20 that they were changing the one order, and they changed the
21 other.

22 MR. MERICLI: Exactly.

23 THE COURT: But I have to tell you, that's not
24 what they did.

25 MR. MERICLI: Exactly. And I just didn't want you

1 to think I understood it until I did understand it.

2 THE COURT: No, I understand. I understand.

3 MR. FELGAR: To go back --

4 THE COURT: I'm trying to decide whether or not
5 now to order you to go back to the State Court. Maybe I
6 should look at U.S. versus Gerbbie and see whether I should
7 make this determination myself.

8 MR. FELGAR: That would be against the rules to go
9 back, Your Honor.

10 THE COURT: No, it wouldn't. There are cases that
11 say I can do that.

12 MR. FELGAR: Section 555 of the Pennsylvania Rules
13 of Criminal Procedure --

14 THE COURT: Yeah, but I don't go by the Rules of
15 Criminal Procedure of Pennsylvania.

16 MR. FELGAR: I see.

17 THE COURT: I go by Federal law.

18 MR. FELGAR: I'm still learning.

19 THE COURT: That's okay. I'm a Federal Judge.
20 You're in Federal Court, so we go by those rules when we
21 can.

22 MR. FELGAR: Rule 35, then.

23 THE COURT: Yes. All right. I'm going to take
24 this under advisement, do some research. I'm going to see
25 what U.S. v. Gerbbie and its progeny have to say in the

1 matter before I order anything.

2 MR. FELGAR: Could I have ROR bail possibly until
3 you make a decision on this? I have only got 14 days left.

4 THE COURT: Exactly. I'm going to let you finish
5 out those 14 days.

6 MR. FELGAR: Why, Your Honor?

7 THE COURT: Because I can't make a determination
8 on this yet. It's the ultimate habeas decision, and I'm not
9 prepared to make that determination yet.

10 MR. FELGAR: Okay.

11 THE COURT: And if I'm not determining whether
12 you're right at this point, I can't let you out.

13 MR. FELGAR: Okay. Two weeks ain't nothing
14 anyways, to what I already did.

15 THE COURT: But there will be an ultimate
16 determination on this issue, and I'm going to decide whether
17 or not to have you go back and get it clarified by Judge
18 Foradori, or whether or not to rule on it myself.

19 MR. FELGAR: Okay. I really need an attorney in
20 this matter, and I will --

21 THE COURT: No. No. We'll figure this out. You
22 have done a fine job. You have clarified it today, and you
23 have made us realize where the problem is.

24 MR. FELGAR: Thank you.

25 THE COURT: Because the reason is, I'm just

1 clearly not sure right now what my authority is. I can only
2 act under my own authority, and I will see what that is.

3 MR. FELGAR: I appreciate that.

4 THE COURT: My staff attorney has just suggested
5 that once you are released, is this moot. I disagree that
6 it is, because there is still an issue of probation and
7 such.

8 MR. FELGAR: Yeah. I checked into that too.

9 THE COURT: Yes. I still thinks that it affects a
10 lot.

11 MR. FELGAR: I was worried about that, and I
12 checked into it, and I found several cases --

13 THE COURT: Quite honestly, I would have taken
14 this under emergency advisement if you have seven months to
15 go, but since you have two weeks, you know --

16 MR. FELGAR: Well, I did file this over a year
17 ago.

18 THE COURT: I understand. I understand. That's
19 how long habeases take, I'm afraid.

20 MR. FELGAR: Okay. Federal Court is kind of
21 crowded right now.

22 THE COURT: Yes. And I read the response of the
23 Government, but it's taken us all this long to see what
24 you're talking about, because it's confusing. Any comments
25 for me on your end before I adjourn?

1 MR. FELGAR: I wanted to finish my letter, though,
2 in reply to Respondent's letter.

3 THE COURT: I have it here.

4 MR. FELGAR: No. No. This one I just drafted up
5 in response to his letter to you on the 19th.

6 THE COURT: Why don't you send that to me.

7 MR. FELGAR: Okay.

8 THE COURT: Just send it in.

9 MR. FELGAR: Do you want a copy of this grievance,
10 Your Honor? I'll send this in too. There's a lot more --

11 THE COURT: I do not have -- I want to you know, I
12 do not have the Sentence Status Summary you were reading
13 from. The last one I have is from 2004.

14 MR. FELGAR: There's a lot more information here,
15 Your Honor, and unlawful acts by officials here at the
16 institution. And I tried to file charges, and they sent the
17 Office of Professional Responsibility down here, who did
18 nothing. And I am just -- I don't know what to do --

19 THE COURT: Well, that's why you're in court.
20 Mr. Mericli, do you have anything you want to add?

21 MR. MERICLI: No, Your Honor.

22 MR. FELGAR: I'd like to change my address, Your
23 Honor.

24 THE COURT: You'll to have do that in writing.
25 You'll to have do that when you send everything in.

1 MR. FELGAR: And I need transcripts too; ask for
2 transcripts.

3 THE COURT: You have to pay for those.

4 MR. FELGAR: Oh, I do?

5 THE COURT: Yes.

6 MR. FELGAR: Okay. I'll get those when I get out,
7 then.

8 THE COURT: All right. It's under advisement.
9 We're going to take a look at what my authority is here.
10 And I will issue either an ROR or an order, depending on
11 that, in due course. And send me anything else you need to
12 send me. And, Mr. Mericli, that's with you as well.

13 MR. MERICLI: Very good, Your Honor. I apologize
14 if there were any --

15 THE COURT: Well, no, we were all -- I mean,
16 Mr. Mericli was trying to figure this out himself,
17 Mr. Felgar. And when he sees what we're talking about now
18 and I see it, we are all stumped.

19 MR. FELGAR: It took me a year to figure it out.

20 THE COURT: So now you understand why it took so
21 long.

22 MR. FELGAR: Yes.

23 THE COURT: All right. And we'll try to get it
24 figured out. All right. We are --

25 MR. FELGAR: Because, your Honor, I went to the

1 Superior Court --

2 THE COURT: Yes, sir.

3 MR. FELGAR: -- or my lawyer did, rather, and they
4 didn't even mention the correction to written sentence order
5 to the Superior Court, and I was denied. The Superior
6 Court, alls they heard was my original sentence. You know.

7 THE COURT: Well, I can't correct that. That's
8 the State Court.

9 MR. FELGAR: I know. I went to Supreme and told
10 them about it and told them how the public senator's office
11 was covering -- trying to cover up this matter, and they
12 denied me too. I don't understand --

13 THE COURT: I don't know -- you know, I honestly
14 don't know if anyone was trying to commit fraud or cover it
15 up. I don't think anyone understood it either.

16 MR. FELGAR: I think Jefferson County became aware
17 of it, and they are liable, Your Honor, for negligence.

18 THE COURT: Well, that will be a separate suit.
19 All right. We're adjourned. Thank you.

20
21 (Proceedings adjourned at 11:02 a.m.)
22
23
24
25